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No. 98-1265

In The
Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
Petitioners,

v.

JAMES F. HINCHMAN, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

The government incorrectly suggests that the question presented here has no broader significance than the instant case. First, the provision of the Portal Act at issue applies, and always has applied, not only to Federal Labor Standards Act ("FLSA") actions, but also to actions under the Walsh-Healey Act and the Davis-Bacon Act -- despite the government's attempt to excise the other two statutes by elision. Op. Cert. 2.[1] Second, the question will affect administrative proceedings with respect to alleged violations of any of these three statutes indefinitely into the future. All three substantive statutes remain in effect, and

[1]The Portal Act provides a two-year limitations period (three years for a willful violation) "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the *Walsh-Healey Act*, or the *Bacon-Davis Act*." 29 U.S.C. § 255 (citations omitted) (emphasis added).

administrative proceedings remain an option under each of them. And, of course, the outcome of *this* dispute affects the rights of more than 14,000 petitioners.[2]

In defense of its position on the merits, the government's opposition -- apparently recognizing the weakness of the arguments it relied on in the courts below -- raises, for the first time, "sovereign immunity," arguing that sovereign immunity raises the threshold petitioners must meet. Raising that threshold, however, cannot afford the government the shelter it seeks from its obligations.

1. Petitioners have no difficulty in establishing the "clear and unequivocal" standard for waivers of sovereign immunity. The government does not dispute that the 1974 amendments to the FLSA, *see* 88 Stat. 55, 58-60, clearly and unequivocally guaranteed federal employees rights under that Act, and waived objection to being held to account for violating those rights. In the Barring Act, Congress provided an administrative forum available for *all* claims against the United States, as long as those claims are presented to the Comptroller General within six years after accrual. 31 U.S.C.§ 3702(b)(1).[3] Thus, Congress clearly and unequivocally waived sovereign immunity with respect to claims the Comptroller General finds

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[2]The government's suggestion that petitioners might "prevail on their just compensation claim on remand," Op. Cert. 14 n.8, is also groundless. The court below remanded the takings clause issue for the trial court to determine whether it had jurisdiction to have decided the question in the first place. Pet. App. 12a. That court had already found against petitioners on the merits of that claim. *Id.* at 10a.

[3]Congress provided that the Barring Act's limitations period applies to claims submitted to the Comptroller General (since 1996, the Office of Personnel Management) *unless* another provision of that Act or another statute provides a different time period for submitting the claim to the Comptroller General. 31 U.S.C. § 3702(b)(1)(A).

valid, *if* presented within that time period.

2. The government's attempt to disregard the express waiver provided by the Barring Act on the ground that it is a *general* waiver that does not specifically refer to FLSA claims, Op. Cert. 15, and therefore is not sufficiently clear and unequivocal, is inconsistent not only with this Court's decisions but also with the government's own position before this Court *this* Term. In *West v. Gibson*, Docket No. 98-238, the government argued that the provision conferring authority upon the EEOC to provide appropriate remedies for Title VII violations was sufficient to waive sovereign immunity for compensatory damages awards, even though the provision conferring authority *did not mention compensatory damages* and, in fact, was enacted *before* compensatory damages were available for such violations. 1998 U.S. BRIEFS 238, *9, *11-*13 (LEXIS). Furthermore, this Court has not required that waivers of sovereign immunity refer to the precise claim at issue, only that they clearly *encompass* the claim. *See, e.g., United States v. Williams*, 514 U.S. 527, 536 (1995) (rejecting the IRS's sovereign immunity defense from a refund suit on the ground that the tax had been paid on another's behalf because the language of the statute waiving immunity was sufficiently broad to encompass such a claim).

3. The government's attempt to rely on the Portal Act's two-year statute of limitations as a provision that overrides the limitations period provided by the Barring Act rests on policy arguments, Op. Cert. 16. The government does not deny that the Portal Act was enacted to "define and limit the jurisdiction of the courts," 29 U.S.C. § 251(b)(3); that the provisions of the Act repeatedly refer to judicial procedures, *see id.* at §§ 252(d), 252(e), 253, 260; and that the limitations provision itself expressly applies to "actions to enforce" a "cause of action" rather than to claims or complaints triggering

agency proceedings. The government also does not dispute that the limitations provision applies not only to FLSA actions, but also to actions under the Walsh-Healey and Davis-Bacon Acts, Op. Cert. 19, and that there were administrative remedies available under both these Acts at the time the provision was enacted. *See L. Gary Clemente*, 33 Comp. Gen. 66, 67 (1953).[4]

Thus, the text of the Portal Act makes clear that Congress chose to limit the limitations provision to court actions ("Congress . . . knows the difference between a civil action and an administrative proceeding," *Gibson v. Brown*, 137 F.3d 992, 997 (7th Cir. 1998), *cert. granted sub nom. West v. Gibson*, 119 S. Ct. 863 (1999)). And that was the contemporaneous understanding of the implementing agencies. *See L. Gary Clemente*, 33 Comp. Gen. at 67 (noting that the Department of Labor, the agency charged with implementing all three Acts covered by the provision, understood that it "only forecloses resort to *court* action after a two-year period," a position with which the Comptroller General agreed) (emphasis added). Congress has not amended the Barring Act or enacted any other provision purporting to limit the time available for initiating *administrative* proceedings under *any* of the three statutes.[5]

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[4]The government's assertion that the Portal Act's references to court actions simply reflects that the FLSA at the time applied only to private employees, Op. Cert. 17 n.9, disingenuously ignores the fact that the limitations provision applied equally to the Walsh-Healey and Davis-Bacon Acts, for which administrative proceedings *were* available.

[5]It has also been the consistent view of this Court and others that the Portal Act was intended to confine an available remedy, rather than the statutory rights themselves, until the decisions below. *See, e.g., Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953); *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972). Contrary to the government's assertion, Op. Cert. 22 n.11, the relevance of these cases does not go to whether the government has waived immunity in this litigation, but to whether the Portal

4. The government's theory that, when Congress extended FLSA rights to federal employees in 1974, it somehow extended the Portal Act's limitations period to administrative proceedings fails for two reasons. First, the 1974 amendments are entirely silent on the question. And they are silent in the face of a well-established rule that the Barring Act's limitation period applies unless Congress makes a different period *expressly* applicable to administrative proceedings. *See, e.g., United States Maritime Comm'n*, 29 Comp. Gen. 54 (1949); *Defense Communications Agency*, 51 Comp. Gen. 20 (1971); *Commodity Credit Corp.*, 41 Op. Att'y Gen. 80, 82 (1951). Moreover, the specific statute of limitation in the Portal Act had been found applicable to judicial actions only. *See L. Gary Clemente*, 33 Comp. Gen. at 67.

Second, the government's argument for reading the 1974

Act can be read to preclude FLSA, Walsh-Healey or Davis-Bacon administrative proceedings if initiated more than two years after the violation. Because the Portal Act imposes a time limit solely on judicial actions, and because that is a limit on the remedy rather than on the right itself, the answer to that question is no. The Portal Act does not limit the availability of administrative remedies under any of these Acts. The sole authority the government relies on for the contrary conclusion does not support its inference. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), did not address the Portal Act's statute of limitation, administrative proceedings or the not-yet-enacted 1974 amendments. *Carter* determined that the Portal Act's definition of non-compensible activities under the FLSA prevailed over pre-existing federal pay provisions for federal employees in the Canal Zone, because the 1967 FLSA amendments were intended to replace other federal pay provisions for these employees. Two years later, when Congress extended FLSA benefits to federal employees generally, it took care to preclude such a decision with respect to the 1974 amendments by making clear that pre-existing federal employment provisions remained in effect alongside the newly applicable FLSA provisions. *See, infra*, pp. 6-7. Whatever the status of *Carter* with respect to Canal Zone workers, it has no bearing on the dispute here, or on any dispute under the 1974 FLSA amendments.

amendments to extend the Portal Act's limitations period to administrative proceedings founders on its mistaken premise: that Congress intended absolute parity between federal and private employees.[6] Although Congress did intend the 1974 amendments to provide federal employees with rights hitherto available only to private employees, as the legislative history the government cites establishes, it is *not* true that Congress intended to limit federal employees to *only* those rights.

Thus, the legislative history details Congress' intention to permit pre-existing federal employee rights to co-exist with the new FLSA rights. *See, e.g.*, H.R. Rep. No. 93-913, at 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2836-38 (explaining that federal employees would continue to enjoy premium pay provisions under Title 5, 5 U.S.C. § 5542(a) -- pay provisions *not* available to private employees). Because federal employees were placed in a very different position than private employees, Congress conferred the authority to interpret and administer FLSA provisions with respect to *federal* employees on the Civil Service Commission (now OPM), which administered other federal employment provisions. 29 U.S.C. § 204(f). In contrast, the Secretary of Labor interprets and administers FLSA provisions as they apply to *private* employees. The regulations adopted by the two agencies are not always identical.

Under this scheme, federal employees may be entitled to greater benefits than similarly situated private employees. Overtime pay for federal employees, for example, is regulated under both the FLSA and Title 5. When "there is an inconsistency between the statutes, [federal] employees are

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[6] Indeed, in the Court of Federal Claims ("CFC") suit that preceded this case, the government argued that Congress did *not* require parity between federal and private employees. *See* Feb. 24, 1992 Gov. Br. in *Adams v. United States*, No. 90-162C (and consolidated cases) at 32-36.

entitled to the greater benefit." *Henry G. Tomkowiak*, 67 Comp. Gen. 247, 250 (1988). Because the statutes calculate eligibility differently, which statute provides the greater benefit depends on the specific circumstances. In contrast, only FLSA overtime is available to private employees.

Congress differentiated between federal and private employees in other significant ways as well. For example, federal employees may count their leave hours as hours worked for FLSA purposes, because of the interaction of the FLSA and federal leave statutes; private employees may not. *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987). Congress also differentiated between private employers and itself, authorizing private employers to assert Secretary of Labor opinions as a defense to FLSA claims. *Berg v. Newman*, 982 F.2d 500, 503-04 (Fed. Cir. 1992). It provided no such defense to itself.[7]

In addition, Congress provided different means for redressing grievances under the FLSA to private and federal employees. Although both may bring individual judicial actions, private employees' rights may also be vindicated through class actions brought by the Secretary of Labor. *See* 29 U.S.C. § 216(c). No such procedure is available to federal employees. Federal employees, however, may submit FLSA claims to the

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[7]The government's policy argument that Congress would not subject itself as an employer to harsher results than it permits to be inflicted on private employers, Op. Cert. 21, is thus inconsistent with the statute Congress enacted. Nor is it compelling as policy. Congress could reasonably choose to hold the government to a higher standard for complying with its own law, especially in light of its unique ability to borrow money and undertake projects notwithstanding the size of its open-ended obligations. Further, the Barring Act's limitations period provides the Comptroller General (now, OPM) with a consistent limitations period regardless of which of the overlapping statutes that supply the substantive rules for federal employment is ultimately determined to govern a particular claim.

Comptroller General (now, the OPM) -- an option not available to private employees. When the Civil Service Commission -- the agency Congress entrusted to administer *federal* employees' FLSA rights -- determined that the Barring Act's six-year limitations period applies to Comptroller General proceedings, it was with respect to a remedy Congress had not provided to *private* employees.[8] This did not mean, contrary to the government's protestations, Op. Cert. 15-16, that Congress subjected private employers and the United States to different liabilities under the FLSA. Private employers are subject to precisely the same liabilities as the United States for violations of the FLSA -- unless the private employees sit on their rights. But Congress made a different range of remedies available to each type of employee, providing an administrative remedy, with its attendant limitations period, only to federal employees.[9]

5. Section 640 cannot provide the government with the support it needs. Section 640 does not, either as originally enacted or as amended, purport to establish a prospective

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[8]The Civil Service Commission promulgated its decision in Federal Personnel Manual Letter 551-15 (issued July 11, 1978), explaining: "In accordance with our authority to administer the FLSA under Section 4(f) of the Act, we will order retroactive wages, if the claim is valid, for a six-year period, dated from receipt of the claim by the Commission." Based on the Commission's views, which were expressly solicited as well as consistent with its own long-standing precedent, the Comptroller General applied the Barring Act's limitations period to FLSA administrative claims, *see, e.g., Transportation Systems Center*, 57 Comp. Gen. 441 (1978), until petitioners' extensive claims were pending. *See Joseph M. Ford*, 73 Comp. Gen. 157 (1994).

[9]The government itself points out another distinction Congress permitted with respect to remedies, Op. Cert. 22 n.11. Private employees may prevail in an untimely judicial action if their employers neglect to assert a statute of limitations defense early in the litigation. For federal employees, however, the government, or a court, may raise untimeliness *at any point*.

limitations period rule, or to decipher the rule available under existing legislation. Section 640, attached to an omnibus budget bill, purported only to accord special protection to certain pending claims. The subsequent amendment, attached to a later budget bill, simply withdrew some but not all of that special protection. And despite its sponsor's rhetoric, even the amendment does not attempt to impose absolute parity between private employees and the pending claims of federal employees (*some* pending administrative claims of federal employees remain specially protected).

6. Finally, the government's attempt to wish away the decisions interpretating the Portal Act's limitations provision as governing only judicial actions is puzzling. *See* Op. Cert. 19, 21. There cannot be any dispute that this Court in *Unexcelled Chemical*, and the Third Circuit, in *Glenn Electric Co. v. Donovan*, 755 F.2d 1028 (3d Cir. 1985), interpreted the same text of the same provision of the Portal Act that the government relies on here, and reached the opposite conclusion as to its scope. The government nonetheless claims there is no conflict between those decisions and the decision below, pointing to the difference between interpreting the scope of the provision when sovereign immunity is not at issue and interpreting the scope of the provision when sovereign immunity is implicated. Op. Cert. 20, 21. For there to be no conflict, however, the government is necessarily arguing that when sovereign immunity is not implicated -- *i.e.*, when the government proceeds against private contractors for violations of labor laws -- the provision limits only judicial actions. But, when sovereign immunity is implicated -- *i.e.*, when federal employees submit administrative claims against the government -- the same words of the same provision have a different meaning altogether. In that circumstance, the provision applies to administrative proceedings also. In other words, the same statutory provision has diametrically opposite meanings depending on what side of

the docket the government finds itself.

This argument is typical of the government's various positions, and actions throughout this litigation; the only consistency is the government's determination not to honor its debts. The government's claims that it has not acted lawlessly is based largely on a misunderstanding of the facts. *See* Op. Cert. 23, n.13. Petitioners did assert, both in the CFC and before the Comptroller General, that the employing agencies had acted *willfully* in claiming exemptions, thus triggering the three-year limitations period under the Portal Act for judicial actions. *See, e.g.*, J.A. 187, 264. And none of the employing agencies' classifications have been upheld. The CFC's initial decision finding some classifications lawful has since been reversed by the Federal Circuit. *Adams v. United States*, Docket No. 98-5011, 1998 U.S. App. LEXIS 23565 (Fed. Cir. Sept. 23, 1998).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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